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7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION
11

12 DEBORAH DI GRAZIA,

13 Plaintiff,

14 v.

15 SAZERAC COMPANY, INC.,

16 Defendant.
17

Case No. 5:08-CV-01562-JW

**DEFENDANT SAZERAC COMPANY'S
REPLY IN SUPPORT OF ITS MOTION TO
DISMISS COMPLAINT FOR FAILURE TO
STATE A CLAIM**

Date: June 9, 2008
Time: 9:00 a.m.
Ctvm: 8
Judge: Hon. James Ware
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1 **I. INTRODUCTION**

2 In its opening brief, Sazerac established that a “purchase” of tequila by Sazerac from
 3 Herradura is the event that triggers any payment obligation by Sazerac to plaintiff. This is true
 4 not because Sazerac wishes it were so or because Sazerac asks this Court to draw inferences in its
 5 favor. The requirement of a “purchase” is found in the express and unambiguous language of the
 6 Royalty Agreement between the parties. *See* Royalty Agreement, ¶1(b)(ii) (payments to
 7 plaintiff’s husband “based upon purchases of the Brands by Sazerac”); *id.* at ¶2(a)(iii) (after
 8 initial guaranteed payment of \$2 million, Sazerac agreed to pay a royalty of \$6 per case “on the
 9 purchases of the brands by Sazerac”). The importance of this condition was underscored when
 10 the parties chose to define in the Royalty Agreement when “[p]urchases by Sazerac from
 11 Herradura shall be deemed to have occurred.” *Id.* at ¶2(a)(v). Why would the parties have
 12 negotiated and included this express definition if plaintiff were to be paid other than based on
 13 Sazerac’s *purchases* of Herradura tequila?¹

14 Plaintiff does not answer this question anywhere in her 19-page brief. Nor does plaintiff
 15 disavow her complaint’s admission that she (and her husband) were always paid by Sazerac based
 16 on Sazerac’s purchases of tequila from Herradura. Compl., ¶17 (“For approximately 15 years,
 17 Sazerac made purchases of Herradura Brands, and it made regular payments to Mr. di Grazia
 18 based on those purchases.”). And plaintiff’s complaint does not allege that Sazerac has made any
 19 purchases from Herradura for which plaintiff has not already received a handsome royalty.

20 Plaintiff also has no meaningful response to the parties’ telling decision to include
 21 alternative payment mechanisms in the early years of the contract but not after January 1, 1999.
 22 *See* Royalty Agreement, ¶2(a)(1) (\$500,000 upfront payment for inventory); *id.* at ¶2(a)(ii)
 23 (guaranteed \$2 million minimum payment by December 31, 1998). Had the parties wished to
 24 include similar payment mechanisms in the event of a buyout or termination after January 1, 1999

25
 26 ¹ In this reply, Sazerac will use the same abbreviations and conventions as defined in its Motion to
 27 Dismiss. The underlying agreement between Sazerac and Herradura is referred to as the Distribution
 28 Agreement. The agreement between plaintiff and Sazerac is referred to as the Royalty Agreement.
 Although plaintiff objects to the latter description, *see* Opp. at p. 1, n.1, her semantic quibble is both
 irrelevant and incorrect. *See, e.g., Cabo Distrib. v. Brady*, 821 F. Supp. 582, 591 (N.D. Cal. 1992) (in sale
 of rights to certain brand of vodka, “\$2.75 million was guaranteed in royalties ...”).

(and after plaintiff was paid at least \$2.5 million) they easily could have done so. Instead, the parties expressly agreed that future payments would be made solely “on the purchases of the brands by Sazerac.” *Id.* at 2(a)(iii). Although plaintiff now wishes to renegotiate the Royalty Agreement 17 years after it was executed, courts will neither “insert in the contract language which one of the parties now wishes were there” nor “add a term about which a contract is silent.” *Levi Strauss & Co. v. Aetna Casualty & Surety Co.*, 184 Cal. App. 3d 1479, 1486 (1986).

Unable to rebut the plain language of the Royalty Agreement, plaintiff purports to base her claim on the “best efforts” clause found in the Distribution Agreement between Sazerac and Herradura. *Opp.* at 7:16-9:23. This argument borders on the frivolous. First, the complaint itself nowhere alleges that Sazerac owed a contractual duty to plaintiff to use “best efforts” to purchase as much tequila as possible from Herradura. Second, neither plaintiff nor her husband were parties to the Distribution Agreement in which the best efforts clause is found. Third, the best efforts clause in the Distribution Agreement says nothing about maximizing sales, as plaintiff suggests, but instead expressly states that “[s]uch efforts shall be directed toward establishing and maintaining the Brands as *premium products* in the distilled spirits industry.” Distribution Agreement, ¶2(a) (emphasis added). Finally, one wonders how plaintiff can claim that the Distribution Agreement (to which she is not a party) was breached when she admits in her complaint that Herradura (a party to the Distribution Agreement) makes no such claim but instead “entered into an agreement whereby Sazerac voluntarily gave up its rights to distribute Herradura Brands in the United States.” *Compl.* ¶19.

Plaintiff’s heavy reliance on an inapplicable “best efforts” clause in a distribution contract to which she is not a party speaks volumes about the overall viability of her complaint. Sazerac and plaintiff’s husband, both sophisticated parties, entered into the Royalty Agreement after negotiations that contemplated a significant upfront payment, a guaranteed minimum payment of \$2 million, and additional payments based exclusively on Sazerac’s *purchases* of tequila. Royalty Agreement, ¶¶2(a)(1), ¶2(a)(ii), 2(a)(iii), 2(a)(v). Had the parties wished to include language entitling plaintiff to substantial additional payments if Sazerac ceased purchasing tequila from Herradura for any reason, they easily could have done so. The absence of such language in

1 the Royalty Agreement should end the inquiry. *Walnut Creek Pipe Dist. v. Gates Rubber Co.*
 2 *Sales Div.*, 228 Cal. App. 2 810, 815 (1964) (“courts cannot make better agreements for parties
 3 than they themselves have been satisfied to enter into or rewrite contracts because they operate
 4 harshly or inequitably”).

5 This is a straightforward case – Sazerac agreed to pay and did pay millions of dollars in
 6 royalties to plaintiff and her husband for more than 15 years. The parties expressly agreed,
 7 however, that future payments would depend solely on Sazerac’s purchases of tequila from
 8 Herradura. Plaintiff is not entitled to rewrite the Royalty Agreement today in order to achieve a
 9 better result in litigation than was negotiated in 1991. The motion to dismiss should be granted.

10 **II. ARGUMENT**

11 **A. Plaintiff Fails to State a Claim for Breach of Contract**

12 In her opposition, plaintiff contends that the plain language of the Royalty Agreement
 13 does not actually require “purchases” by Sazerac before payments are due to plaintiff. Opp. at
 14 6:13-23. At a minimum, she argues that the existence of this condition is a question for
 15 discovery. *Id.* at 6:23-26. Alternatively, plaintiff theorizes that Sazerac’s obligation to pay her
 16 more money is found not in the Royalty Agreement to which she is a party, but rather in the
 17 Distribution Agreement to which she is not. *Id.* at 7:16-9:23. Plaintiff is wrong on all counts.

18 **1. Plaintiff Ignores the Plain Terms of the Royalty Agreement**

19 Plaintiff makes the startling claim that “there is no ... language” in the Royalty
 20 Agreement conditioning Sazerac’s obligation to pay plaintiff on Sazerac’s purchases of tequila
 21 from Herradura. Opp. at 6:19. Not so. The Royalty Agreement expressly provides that
 22 “subsequent payments [will be made to plaintiff’s husband] based upon purchases of the Brands
 23 by Sazerac.”² Royalty Agreement, ¶1(b)(ii)(B). *See also id.* at ¶2(a)(iii) (“Sazerac shall make to
 24 DiGrazia a payment *on the purchases* of the Brands by Sazerac of \$6 per 9L case”) (emphasis
 25 added). The term “purchases” was expressly defined in the same paragraph that set forth the
 26 specific payments to plaintiff’s husband: “purchases by Sazerac from Herradura shall be deemed

27 _____
 28 ² For purposes of this motion, Sazerac assumes *arguendo* that plaintiff is a proper assignee of her late husband’s rights under the Royalty Agreement.

1 to have occurred when ownership of the Brands has transferred from Herradura to Sazerac at the
2 F.O.B. point ...” *Id.* at ¶2(a)(v).

3 Plaintiff also half-heartedly suggests that the “purchase” condition is not really a condition
4 because elsewhere the parties conditioned all of their obligations under the Royalty Agreement on
5 the original execution of the Distribution Agreement between Herradura and Sazerac. *Opp.* at
6 6:19-23. This is a red herring. It is hardly surprising that plaintiff’s husband and Sazerac initially
7 conditioned the Royalty Agreement on Sazerac’s ability to finalize the Distribution Agreement
8 with Herradura. Without the latter, there was no basis for the former. But this tells us nothing
9 about the payment structure actually set forth in the Royalty Agreement, including the question of
10 whether the Royalty Agreement required certain events to occur before Sazerac’s payment
11 obligations matured. To answer this question, we must turn to the specific provisions in the
12 Royalty Agreement. As detailed in Sazerac’s opening brief and above, those provisions
13 unequivocally provide that after January 1, 1999, Sazerac is only obligated to pay plaintiff when
14 Sazerac makes “purchases” of Herradura tequila.

15 This is hardly a question for discovery as plaintiff suggests. Consistent with proper
16 practice under Rule 12(b)(6), Sazerac has referred only to the complaint and the attached
17 contracts in its opening brief and this reply. Sazerac does not ask the Court to draw any
18 inferences but instead cites only to the plain language of the relevant contracts. Sazerac is
19 entitled to the benefit of a fair reading of that explicit language and that is all Sazerac seeks. *See*
20 *National City Police Officers’ Assn. v. City of National City*, 87 Cal. App. 4th 1274, 1279 (2001)
21 (holding that “language of an instrument must govern its interpretation if the language is clear and
22 explicit”); *Wylar Summit Partnership v. Turner Broadcasting Sys., Inc.*, 135 F.3d 658, 665 (9th
23 Cir. 1998) (“neither we nor the district court are required to accept as true conclusory allegations
24 in the complaint which are contradicted by the clear import of the contract itself”).

25 Plaintiff does not, and cannot, allege that any purchases have taken place for which she
26 has not already been paid a significant sum. It is well established that where a defendant’s duty to
27 perform is conditioned on an event, plaintiff must plead and prove that the event transpired.

28

1 *Consol. World Invests., Inc. v. Lido Preferred Ltd.*, 9 Cal. App. 4th 373, 380 (1992).
 2 Accordingly, the breach of contract claim must be dismissed.

3 **2. Plaintiff Cannot Rely on the “Best Efforts” Clause in the Distribution**
 4 **Agreement**

5 Unable to muster any support for her claims under the Royalty Agreement, plaintiff
 6 turns to the “best efforts” clause of the Distribution Agreement between Sazerac and Herradura.
 7 Although she is not a party to that agreement, and although the best efforts clause says nothing
 8 about maximizing purchases or sales, plaintiff imagines that Sazerac owed plaintiff “the duty to
 9 exert its best efforts to make sales of Herradura Brands, and breached that duty by abandoning
 10 its right to make such sales in exchange for a lump-sum payment.” Opp. at 9:19-21. This
 11 theory suffers from two major defects. First, plaintiff wrongly asserts that the best efforts
 12 clause in the Distribution Agreement is incorporated into the Royalty Agreement. Second,
 13 plaintiff inaccurately describes and interprets the best efforts language in the Distribution
 14 Agreement.

15 Without citation to any relevant authority, plaintiff claims that because the Royalty
 16 Agreement and Distribution Agreement “refer to and rely on upon each other at many points,”
 17 they are “interdependent.” Opp. at 7:21-8:8. From this shaky foundation, plaintiff asserts that
 18 terms from the Distribution Agreement, including the best efforts clause, must be incorporated
 19 into the Royalty Agreement. Plaintiff concludes her convoluted journey by suggesting that she, a
 20 non-party to the Distribution Agreement, is nevertheless the proper party to enforce its terms.

21 Plaintiff’s argument is sophistry. As a threshold matter, the Royalty Agreement simply
 22 does not incorporate by reference any terms from the Distribution Agreement. *Shaw v. Regents of*
 23 *University of California*, 58 Cal. App. 4th 44, 54 (1997) (“[f]or the terms of another document to
 24 be incorporated into the document executed by the parties the reference must be clear and
 25 unequivocal”) (internal quotation omitted). While the Royalty Agreement is necessarily
 26 related to the Distribution Agreement, this is a common occurrence with commercial
 27 arrangements involving licenses, royalties, and commissions. Even if one accepts plaintiff’s
 28

1 “interdependent” characterization, that is a far cry from concluding that a party to one agreement
2 can enforce the terms of a separate agreement to which she is not a party.³

3 The authority cited by plaintiff only undermines her position. Both of the decisions relied
4 on by plaintiff involve surety contracts that, by their nature and express terms, guarantee the
5 performance of another contract. *See Cates Const. v. Talbot Partners*, 21 Cal. 4th 28, 40 (1999);
6 *Central Building, LLC v. Cooper*, 127 Cal. App. 4th 1053, 1058 (2005). Both *Cates* and *Central*
7 *Building* invoked Civil Code Section 2787, defining “a surety or guarantor [as] one who promises
8 to answer for the debt, default, or miscarriage of another.” *Cates*, 21 Cal. 4th at 40; *Central*
9 *Building*, 127 Cal. App. 4th at 1058. Plaintiff does not allege that either the Royalty Agreement
10 or the Distribution Agreement contain “guarantee” language such as that found in *Cates* and
11 *Central Building*. Nor do the plain terms of the Royalty Agreement provide that Sazerac would
12 act as a surety or a guarantor of own performance under the Distribution Agreement.

13 Moreover, the principal “best efforts” cases relied on by plaintiff simply underscore the
14 fatal defect in plaintiff’s position. In both of those cases, the party seeking to enforce the “best
15 efforts” clause was a party to the distribution agreement containing that clause. *Opp.* at 9:1-13
16 (citing *Bloor v. Falstaff Brewing Corp.*, 454 F. Supp. 258, 260-61 (S.D.N.Y. 1978); *Carlson Dist.*
17 *Co. v. Salt Lake Brewing Co.*, 95 P.3d 1171 (Utah Ct. App. 2004)). Plaintiff has no such standing
18 here.

19 Even if the “best efforts” obligation was somehow incorporated into the Royalty
20 Agreement, that obligation only applies to Sazerac’s performance under the Distribution
21 Agreement ***while it is in effect***, not after Sazerac and Herradura mutually agree to end their
22 association. The Distribution Agreement provides a termination regime under a variety of
23 scenarios. Distribution Agreement, ¶21. As plaintiff concedes, Herradura is not pressing its own
24 “best efforts” claim but instead “entered into an agreement” with Sazerac “whereby Sazerac
25 voluntarily gave up its rights to distribute Herradura Brands in the United States.” *Compl.*, ¶19.
26 Plaintiff has provided no authority for the proposition that she is entitled not only to revive

27 ³ Sazerac also observes that plaintiff’s characterization of the two agreements as “interdependent” is
28 inconsistent with her previous contention that Sazerac is obliged to pay her money under the Royalty
Agreement even if the Distribution Agreement has ended.

1 Sazerac's obligations under the now-defunct Distribution Agreement – to which plaintiff is not a
2 party – but also to incorporate them into the Royalty Agreement.⁴

3 Finally, plaintiff's entire argument is premised on an inaccurate reading of the best efforts
4 clause in the Distribution Agreement. Plaintiff contends that the provision obligated Sazerac "to
5 exert its best efforts to make sales of Herradura Brands..." Opp. at 9:19. Plaintiff is mistaken.
6 The Distribution Agreement states that Sazerac's "[best] efforts shall be directed toward
7 establishing and maintaining the Brands as *premium products* in the distilled spirits industry."
8 Distribution Agreement, ¶2(b) (emphasis added). The provision says nothing about maximizing
9 sales. Thus, even if plaintiff could find comfort in the "best efforts" language – and she cannot
10 because that language is not incorporated into the Royalty Agreement – it would do nothing to
11 advance her assertion that Sazerac should have purchased and sold more Herradura tequila. For
12 this additional reason, her breach of contract claim should be dismissed.

13 **B. Plaintiff Fails to State a Claim for Breach of the Duty of Good Faith and Fair**
14 **Dealing**

15 Plaintiff claims that Sazerac breached the implied covenant of good faith and fair dealing
16 because it "willfully injured her right to receive the benefits of the Agreement." Opp. at 10:3-5.
17 To the extent this cause of action sounds in tort, it must fail because plaintiff has not pled that "a
18 special relationship exists between the parties." *Seaman's Direct Buying Serv., Inc. v. Standard*
19 *Oil, Inc.*, 36 Cal. 3d 752, 768-69 (1984). Nor could plaintiff make such a claim. As a matter of
20 law, there is no special relationship where the contract is "entered into for the usual business
21 reason of profit." *Multiplex Ins. Agency, Inc. v. Cal. Life Ins. Co.*, 189 Cal. App. 3d 925, 937-38
22 (1987) *Little Oil Co, Inc. v. Atlantic Richfield Co.*, 852 F.2d 441, 446-47 (9th Cir. 1988) (no
23 special relationship in franchisor-franchisee relationship). Even where one party is responsible
24 for the payment of commissions to another party, courts have held that no special relationship is
25 established. *See Multiplex*, 189 Cal. App. 3d at 938.

26 ⁴ If plaintiff is trying to revive the Distribution Agreement and claim that Sazerac breached its best efforts
27 obligation, she is necessarily litigating the best efforts clause on behalf of Herradura. In that case, she has
28 failed to join an indispensable party – Herradura – and her complaint must also fail for this reason. *See*
Fed. R. Civ. Proc. 19(b); *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 867 (9th
Cir. 2004).

Moreover, and as discussed in Sazerac's opening brief, the courts will not imply terms in a contract that would vary its express terms. *Carma Developers Inc. v. Marathon Development Cal. Inc.*, 2 Cal. 4th 342, 374 (1992). Plaintiff does not address this authority and nowhere suggests how (or why) the Court should imply a new term – one that would guarantee plaintiff payments even in the absence of purchases – when the express terms of the Royalty Agreement state that all “subsequent payments” to plaintiff's husband will be “based upon purchases of the Brands by Sazerac.” Royalty Agreement, ¶1(b)(ii)(B). Plaintiff's second cause of action should be dismissed on this basis alone.

The second cause of action is vulnerable for a third reason. Courts will not imply a duty to continue doing business where there has been a substantial minimum payment. *See Cousins Inv. Co. v. Hastings Clothing Co.*, 45 Cal. App. 2d 141, 149 (1941) (where substantial minimum payment made by obligor, the covenant of good faith and fair dealing will not impose additional duty to stay in business); *College Block v. Atlantic Richfield Co.*, 206 Cal. App. 3d 1376, 1381-82 (1988) (applying same analysis).

Plaintiff contends this authority is inapposite because she is not arguing for an “implied covenant of continued operation.” Opp. at 11:1-5. Yet elsewhere in the opposition plaintiff vigorously contends that Sazerac “voluntarily relinquished its right to make sales altogether,” *id.* at 2:1-2, “gave up its rights to distribute Herradura Brands,” *id.* at 4:19-20, and “abandon[ed]” its business with Herradura “in exchange for a lump sum payment,” *id.* at 9:20-21. In other words, plaintiff's precise argument is that Sazerac owed her a covenant to continue operations, *i.e.*, to stay in the business of selling Herradura tequila. Because plaintiff has framed her claim in these terms, the authority cited by Sazerac is relevant and compelling. Plaintiff's husband received guaranteed payments of \$500,000 and \$2 million in the early years of the Royalty Agreement. Royalty Agreement, ¶¶2(a)(i)-(ii). Thereafter, plaintiff's husband and plaintiff herself have received substantial additional payments. Compl., ¶¶17-18. Under these circumstances, the covenant of good faith and fair dealing will not impose an additional duty on Sazerac to continue doing business with Herradura for plaintiff's benefit. *Cousins*, 45 Cal. App. 2d at 149; *College Block*, 206 Cal. App. 3d at 1381-82.

1 **C. Plaintiff Fails to State a Claim for Unjust Enrichment**

2 Plaintiff invests substantial energy discussing the appropriate legal terminology for the
3 claim that she labeled “unjust enrichment.” Opp. at 11:24-13:10. Plaintiff’s preoccupation on
4 this score is understandable – “there is no cause of action in California for unjust enrichment.”
5 *Melchior v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 793 (2003). Plaintiff’s third cause of
6 action should be dismissed on this basis alone.

7 Even assuming *arguendo* that plaintiff is entitled to rewrite her complaint in an opposition
8 brief, the third cause of action is still fatally flawed. Whether plaintiff’s claim is labeled unjust
9 enrichment, quasi-contract, or restitution, it fails because she has not alleged why it was “unjust”
10 for Sazerac to retain a benefit that it was entitled to retain. Plaintiff’s claim rests on the
11 proposition, directly contradicted by the Royalty Agreement, that Sazerac has some duty to pay
12 plaintiff additional sums even if Sazerac is not making any purchases of Herradura tequila (and
13 even after plaintiff and her husband were already paid millions of dollars). As plaintiff herself
14 admits, her claim is dependent on the assertion that Sazerac received payment for its rights
15 “contrary to the terms of the [Royalty] Agreement.” Opp. at 13:17-20.

16 Not surprisingly, plaintiff’s invocation of the Royalty Agreement in this passage (and
17 elsewhere) arrives without any citation to a specific provision. This is because there is no
18 language in the Royalty Agreement that: (1) requires Sazerac to pay plaintiff upon any event
19 other than the purchase of Herradura tequila; or (2) requires Sazerac to pay plaintiff if Sazerac’s
20 rights under the Distribution Agreement are terminated voluntarily or involuntarily. Plaintiff’s
21 inability to plead that which she admits is required – conduct by Sazerac “contrary to the terms of
22 the Royalty Agreement” – requires dismissal of her third cause of action.

23 Nor does plaintiff cite to any relevant authority to support her theory that Sazerac is subject
24 to the extra-contractual obligations she *now* wishes to impose. Plaintiff’s heavy reliance on *First*
25 *Nationwide Savings v. Perry*, 11 Cal. App. 4th 1657, 1669-70 (1992), is especially misplaced. Opp.
26 at 14:6-28. In that case, the defendant kept all of the proceeds from a sale of real property with actual
27 knowledge that the property was partially owned by plaintiff. Reversing a sustained demurrer, the
28 court concluded that plaintiff pled sufficient facts to proceed on a claim for unjust enrichment. *Id.*

1 at 1671. The decision in *First Nationwide* involved documented mutual ownership of real property;
2 it is logical that neither party could keep 100% of the proceeds from a sale of that land.

3 These facts could not be more different from the present dispute, which involves a
4 straightforward commercial agreement to pay royalties upon the purchase of a specified product.
5 Indeed, the decision in *First Nationwide* actually highlights the weakness of plaintiff's claim because
6 it underscores what plaintiff fails to plead in *her* complaint: (1) plaintiff is not a party to the
7 Distribution Agreement and the Royalty Agreement by its own terms does not invest plaintiff with
8 any ownership rights in the Distribution Agreement; (2) unlike the plaintiff in *First Nationwide*,
9 which held a deed of trust over the subject property, plaintiff cannot plead any ownership interest in
10 Sazerac's rights under the Distribution Agreement; and (3) Sazerac has not sold or conveyed any
11 property interest in a way that violates any term of the Royalty Agreement with plaintiff.

12 Whatever label plaintiff attaches to her third cause of action, what she is really seeking is
13 to insert a new clause into the Royalty Agreement that would entitle her to an additional
14 substantial payment for events other than Sazerac's "purchases" of tequila. But that is not what
15 the parties agreed to and plaintiff is not entitled to conduct a "do-over" of the negotiations that
16 took place 17 years ago between two sophisticated parties. Had plaintiff's husband wished to
17 negotiate for a guaranteed payment in the event Sazerac's rights under the Distribution
18 Agreement were terminated or bought out, he certainly could have done so. In the absence of
19 such a provision, however, plaintiff has no basis to claim that Sazerac was "unjustly enriched"
20 when Sazerac's conduct was firmly within the bounds of both agreements. *See Heppler v. J.M.*
21 *Peters Co.*, 73 Cal. App. 4th 1265, 1291 (1999) (declining to enforce alleged term of agreement
22 because parties "could have included such a provision" had that been their intent).

23 **D. Plaintiff Fails to State a Claim for Breach of an Implied Covenant to**
24 **Continue Purchasing Herradura Brands**

25 Plaintiff asks the court to imply a covenant on the part of Sazerac to continue purchasing
26 Herradura brands, and she contends that such a covenant is indispensable to the Royalty
27 Agreement. In support of this theory, plaintiff again relies on her claim that Sazerac was required
28 to use its "best efforts" to sell as much Herradura tequila as possible under the Distribution

1 Agreement. Opp. at 16:15-25. As discussed above, this claim fails because: (1) the best efforts
 2 clause in the Distribution Agreement was not incorporated into the Royalty Agreement; and (2)
 3 the language of the clause speaks to maintaining Herradura as a “premium brand,” not to
 4 maximizing purchases or sales. Distribution Agreement, ¶2(a).

5 Moreover, plaintiff provides no meaningful response to the fact that the implied covenant
 6 she proposes would alter the express terms of the Royalty Agreement. As Sazerac has
 7 painstakingly documented, the Royalty Agreement sets forth a specific payment regime that
 8 included an upfront payment of \$500,000 based on inventory then on hand; a guaranteed
 9 minimum payment of \$2 million; and additional payments based exclusively on Sazerac’s
 10 purchases of tequila. Royalty Agreement, ¶¶2(a)(1), ¶2(a)(ii), 2(a)(iii), 2(a)(v).⁵ Plaintiff cannot
 11 dispute that she now wishes to be paid for something else and in a different way. This is
 12 precisely the sort of “implied” amendment to express contractual terms that California law
 13 prohibits. *See Carma Developers*, 2 Cal. 4th at 374.

14 **E. Plaintiff Fails to State a Claim for Third-Party Beneficiary Rights**

15 In advancing her claim as a third-party beneficiary, plaintiff conflates the two agreements
 16 at issue. In its opening brief, Sazerac observed that the plaintiff must plead “that the subject
 17 contract was made expressly for her benefit and that it clearly appears in the contract that she was
 18 an intended beneficiary.” Opening Brief at 14:14-17 (citing Cal. Civ. Code § 1559; *Murphy v.*
 19 *Allstate Ins. Co.*, 17 Cal. 3d 936, 943 (1976)). Based on plaintiff’s complaint, the “subject
 20 contract” is not the Royalty Agreement but rather the Distribution Agreement. Compl., ¶¶38-41.
 21 It is undisputed that plaintiff nowhere pleads (nor could she) that *she* was intended to be an
 22 express beneficiary of the Distribution Agreement. Plaintiff’s reliance on the assignment clause
 23 in the Royalty Agreement, Opp. at 18:19-19:11, is no cure for this fatal defect.

24 ⁵ Plaintiff states “that there was no minimum payment” due from Sazerac under the Royalty Agreement.
 25 Opp. at 17:5 & n.9. This mystifying contention is belied by the plain terms of the provisions set forth in
 26 the text above. The “initial payment” of \$500,000 was tied to a portion of the inventory that the parties
 27 recognized was then “existing.” Royalty Agreement, ¶¶1(d)(i)(A) and 2(a)(1). The next \$2 million due
 28 plaintiff’s husband was also guaranteed – “If by December 31, 1998, Sazerac has not made to DiGrazia
 payments totaling \$2,000,000, Sazerac will pay to DiGrazia, on that date, an amount equal to the
 difference between actual payments made and \$2,000,000.” *Id.* at ¶2(a)(ii). It bears emphasis that
 plaintiff acknowledges that each of these guaranteed amounts (and much more) was in fact paid. *See*
 Compl. ¶¶17-18.

Even if she had standing as a third-party beneficiary, plaintiff cannot maintain her claim because she does not plead that Sazerac violated the Distribution Agreement. *See* Compl. ¶¶37-42. An alleged third-party beneficiary is only entitled to enforce the underlying contract in the event of a breach of that contract. *Gulf Ins. Co. v. Hi-Voltage Wire Words, Inc.*, 388 F. Supp. 2d 1134, 1336-37 (E.D. Cal. 2005). Although plaintiff now imagines that Sazerac somehow violated the “best efforts” clause in the Distribution Agreement, that allegation is absent from the complaint and is in fact expressly contradicted by the specific allegations therein. *See* Compl., ¶19 (alleging that “Herradura and Sazerac entered into an agreement whereby Sazerac *voluntarily* gave up its rights to distribute Herradura Brands in the United States”). Moreover, plaintiff is simply wrong when she contends that the “best efforts” language relates to maximizing purchases and sales of tequila; as discussed above, the clause relates solely to maintaining the brands as premium products. Distribution Agreement, ¶2(a). Plaintiff cannot complain of a breach that did not occur. The fifth cause of action should be dismissed.

III. CONCLUSION

For each of the foregoing reasons and those asserted in Sazerac’s Motion to Dismiss, Sazerac respectfully requests that this Court dismiss with prejudice, and without leave to amend, each cause of action asserted in plaintiff’s complaint.

Dated: May 23, 2008

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/s/

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PROOF OF SERVICE
(FRCP 5)

I am a citizen of the United States and a resident of the State of California. I am employed in San Diego County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is Cooley Godward Kronish LLP, 4401 Eastgate Mall, San Diego, California 92121. On the date set forth below I served the documents described below in the manner described below:

**DEFENDANT SAZERAC COMPANY REPLY IN SUPPORT OF ITS MOTION TO
DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM**

on the following part(ies) in this action:



(BY ELECTRONIC MAIL) I am personally and readily familiar with the business practice of Cooley Godward Kronish LLP for the preparation and processing of documents in portable document format (PDF) for e-mailing, and I caused said documents to be prepared in PDF and then served by electronic mail to the parties listed below.

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Executed on May 23, 2008, at San Diego, California.

/s/ _____
Jacqueline J. Foglio